NO. 88-262

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

KEITH DEERMAN and FRANCIS G. KINNEY,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution permits retrial of a defendant whose first trial ended because the trial court interfered with what was properly the defendant's primary choice either to discharge or send back for further deliberation a jury that was less than unanimous but not hopelessly deadlocked.

2. Whether a reviewing court may avoid the collateral estoppel effect of an acquittal by positing a theory of acquittal that would necessarily have required the jury to disregard the trial court's instructions of law. And whether, applying the proper standard, principles of collateral estoppel bar reprosecution of a defendant who has been acquitted of conspiracy to possess, possession, and aiding and abetting of possession with intent to distribute

marijuana, when the government's reprosecution is for telephone calls that allegedly facilitated the importation of that same marijuana.

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Keith Deerman and Francis G. Kinney, by their respective counsel Arthur A. Lemann, III and Robert Glass, petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the United States District Court for the Eastern District of Louisiana denying petitioners' motions to dismiss a superseding indictment. The superseding indictment was filed following a jury's acquittal of petitioners

on two counts and failure to agree on the remaining counts of the original indictment.

OPINIONS BELOW

The Fifth Circuit panel decision affirming the district court's denial of petitioners' motions to dismiss the superseding indictment is reported at 837 F.2d 684 (5th Cir. 1988) and reprinted as Appendix A.

RULES AND STATUTES IMPLICATED

The specific rule implicated in petitioners' case, which is reprinted as Appendix B, is Rule 31(d) of the Federal Rules of Criminal Procedure.

JURISDICTION

The panel decision of the United States Court of Appeals for the Fifth Circuit is dated February 17, 1988. Petitioners filed a petition for panel rehearing and for

rehearing en banc on March 7, 1988. The petition for rehearing en banc was denied on May 18, 1988. A request for stay of mandate was then denied on June 9, 1988. The petition is timely, having been filed within 60 days of this subsequent judgment. Jurisdiction is present under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On October 10, 1985, petitioners Keith Deerman, Francis G. Kinney, and 25 other individuals were charged in a four count indictment alleging conspiracy to import marijuana in violation of 21 U.S.C. §§ 952 and 963 (Count 1); attempted importation and aiding and abetting importation of marijuana in violation of 21 U.S.C. §§ 952, 963 and 18 U.S.C. § 2 (Count 2); conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 3); and possession

and aiding and abetting possession of marijuana with intent to distribute in violation of 21 U.S.C. § 955(c) and 18 U.S.C. § 2 (Count 4).

The trial in district court ended on February 7, 1986. Deerman and Kinney were acquitted of conspiracy to possess, possession, and aiding and abetting possession. The foreman of the jury originally announced a verdict of guilty against petitioners on the counts of conspiracy and attempt to import. A poll of the jury, however, revealed that the guilty verdicts were less than unanimous. Nevertheless, the trial court accepted and recorded the guilty verdicts. Petitioners moved for new trials, the government confessed the trial court's error, and a new trial was granted on February 28, 1986.

On March 11, 1986, the grand jury returned a superseding indictment against petitioners. Counts 1 and 2 recharged the

original charges of conspiracy and importation of marijuana. Counts 3 and 4 charged Kinney with use of the telephone to facilitate the conspiracy and attempt to import the marijuana involved in the original indictment; Counts 5, 6, and 7 similarly charged Deerman. Deerman and Kinney filed motions to dismiss the superseding indictment, arguing that retrial of the offenses charged in Counts 1 and 2 was double jeopardy and that trial on Counts 3 through 7 was collaterally estopped. The trial court denied the motion on January 14, 1987. On August 18, 1987, Deerman and Kinney appealed to the Fifth Circuit, which stayed proceedings. On February 17, 1988, the Fifth Circuit affirmed the district court's denial of petitioners' motions. The Fifth Circuit panel simply concluded that there had been "every reason to believe that [the] jury could not agree on a verdict," and therefore the trial court had "discharged the jury

because it was manifestly necessary to do so." Under these circumstances, the Fifth Circuit found no impediment to retrial. On the issue of collateral estoppel, the Fifth Circuit agreed with petitioners that the jury had rejected the government's argument that Deerman and Kinney had made the telephone calls to knowingly faciliate the possession of marijuana. Nevertheless, the court went on to parse the element of intent common to both possession and importation, and concluded that the jury had in fact not decided against the government on the question of petitioners' knowing facilitation of importation, and that the question was still open.

REASONS FOR GRANTING THE WRIT

The first question raised on these facts is, given the circumstances attending the verdict and jury polling at petitioners' first trial, would trying them a second time

place them in double jeopardy? At the conclusion of petitioners' first trial on the various marijuana charges, the jury was polled at the request of the government. Upon reaching the eighth juror, the following exchange took place:

THE CLERK:	Kathleen Allen, is this your verdict?
JUROR ALLEN:	No.
MR. LEMANN:	Let the record reflect this juror has answered no to the question.
THE COURT:	Is this not your verdict?
JUROR ALLEN:	No.
MR. LEMANN:	I would move for a mistrial.
THE COURT:	Mr. Lemann, please have a seat, I will ask you to continue polling the juror.

Vol. 6 (2d supp.), T. 4-5.

The clerk reached the twelfth juror:

THE CLERK: Annette Trotter, is this your verdict?

JUROR TROTTER: No.

MR. LEMANN: At this time I reurge my motion for mistrial.

THE COURT: Let me have the jury list. Ms. Allen, is it your statement that at this time this is not your verdict?

JUROR ALLEN: (Nods in the affirmative.)

THE COURT: I need for you to speak up, Ms. Allen.

JUROR ALLEN: Yes.

THE COURT: And in what respect is it not your verdict?

JUROR ALLEN: I just can't deal with having someone's life in my hands.

THE COURT: Has the verdict as announced by the foreman, was it indeed, your verdict when you

were in the jury room?

MR. LEMANN: Your Honor.

THE COURT: You are out of order. Ms. Allen, answer my question.

Vol. 6 (2d supp.), T. 5-6.

The court further questioned these jurors, eventually eliciting admissions from both that they had agreed with the originally announced verdict when in the jury room. Id. at 6-7. The transcript pages following these admissions chronicle the trial court's single-minded and unrelenting impeachment of these two jurors, culminating in the court's ordering the clerk to "enter the verdict as handed to the court by the foreman." Id. at 10-11. At that point, two more jurors spoke, evidencing further disharmony. Nevertheless, the court discharged the jury, declaring its acceptance of the verdict as announced by the foreman, as well as its intention to "fashion

its judgment" according to that verdict. Id. at 12-13.

Ultimately, of course, petitioners had no choice but to file a motion for a new trial, which was granted. Upon that slim portion of the overall facts, the Fifth Circuit determined that there was no bar to reprosecution. The appellate court reasoned that because the defendants ultimately sought and were granted a new trial based on a mistrial, there need be no inquiry into what led to the defendants' motion in the first place. Closer scrutiny reveals that the defendants were forced into this action, their statutory options under Rule 31(d), F.R.Cr.P., having been judicially usurped and foreclosed.

Rule 31(d), F.R.Cr.P., provides:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire

> for further deliberations or may be discharged.

As the record shows, the trial court did neither upon its discovery, instead forging ahead and impeaching the dissenting jurors, ignoring the additional voices of uncertainty, and riding over any attempts by the defense to have a mistrial declared on the spot. Thus, the court foreclosed the defendants' Rule 31(d) mistrial option. Suffice it to say, the defendants' other Rule 31(d) option, that of asking that the jury be sent back for further deliberations was cut off almost immediately, when the trial court's probe of the jury ranks revealed further uncertainties. a serious split.

This Court announced the well-settled rule against revealing the numerical division of a jury in Brasfield v. United States, 272 U.S. 448 (1926):

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for

> reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature and extent of its division. The effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious though not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

The circuit courts have condemned inquiries into numerical division as per se error. See, e.g., Cook v. United States, 254 F.2d 871 (5th Cir. 1958); United States v. Aimone, 715 F.2d 822 (3rd Cir. 1983); United STates v. Sptiz, 696 F.2d 916 (11th Cir. 1983). Efforts to coerce and impeach dissenting jurors, such as occurred in this case, where the trial court questioned the dissenting

jurors for seven pages of transcript, have likewise been condemned. United States v. Nelson, 692 F.2d 83 (9th Cir. 1982); Sincox v. United States, 571 F.2d 876 (5th Cir. 1978); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); Matthews v. United States, 252 A.2d 505 (D.C. App. 1969).

The case law thus yields the general rule that when a trial court continues polling a jury and uncovers numerical division "for no useful purpose," such judicial misconduct is per se error; when the trial has been cut off without the defendant's consent and without manifest necessity, then the defendant cannot be made to answer the charges a second time. Arizona v. Washington, 434 U.S. 497 (1978); Brasfield v. United States, supra; United States v. Aimone, supra; United States v. Spitz, supra; Cook v. United States, supra; United States v. Amaya, 509 F.2d 8 (5th Cir. 1975). In addition, the trial court in this case

erroneously seized whatever control or options the defendants may have had from the very moment the jury was first determined to be in discord. It ignored two motions for mistrial made by Deerman's counsel, then swiftly and cleanly short-circuited any possibility of resolving the lack of unanimity by ferreting out still more discord.

From the outset, the needs and interests of the defendants, which Rule 31(d) was specifically intended to safeguard, were brushed aside, any control over the matter or voice in the controversy stifled. The defendants' eventual motion for mistrial was as inevitable as it was forced; it was their only available remedy. This judicial "overreaching" removed from the hands of the defendants that "primary control over the course to be followed" in the event of errors implicating double jeopardy principles. United States v. Dinitz, 424 U.S. 600, 609

(1980); United States v. Jorn, 400 U.S. 470 (1971).

In reaching its decision, the Fifth Circuit went no further than to note that a mistrial was sought and granted. Notwithstanding the trial court's usurpation and foreclosure of petitioners' possible Rule 31(d) options, its acceptance of the original verdict from a manifestly uncertain jury, and the remedial choice forced upon petitioners, the Fifth Circuit declined to consider these arguments, contenting itself with the statement: "Appellants point to no prejudice they suffered as a result of the delay." 837 F.2d at 689. This misses the point of petitioners' arguments. The delay was not the source of prejudice. Rather, the prejudice began with the trial court's taking control at the time the original jury was polled. At no point was there any opportunity for counsel to weigh the relative benefits of seeking mistrial against

requesting further deliberation. The jury was not so hopelessly deadlocked as to create the "manifest necessity" justifying a mistrial without further deliberation. United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824).

The Fifth Circuit cites the decision of the United States Court of Appeals for the Sixth Circuit in United States v. Love, 597 F.2d 81 (6th Cir. 1979), as an example of a case where a juror changed his vote during a poll and the court granted a mistrial. In Love, the Sixth Circuit held that there was no bar to retrial, having found that under the circumstances there had been no chance that further deliberation could break the deadlock. Petitioners are familiar with Love; the decision was cited in their original brief to the Fifth Circuit. It was not only cited, however, it was factually distinguished. The Love jury had held lengthy deliberations; the Deerman/Kinney

jury had not. The Love jury requested further instructions after the initial deadlock; the Deerman/Kinney jury did not. The Love jury informed the judge that it could not reach a decision; the Deerman/Kinney jury made no such announcement. The Love judge was not on record as having conducted an interrogation probing the numerical division within the jury. Nor was the Love judge on record as having overridden or preempted any attempts by the defense to ask for mistrial or requests for further deliberation. In short, the Love court was faced with a manifestly deadlocked jury, a deadlock supported by strong circumstantial evidence. Delay or no delay, petitioners had no choice of remedies following the trial court's decision to accept the original verdict. Once that verdict was recorded and the jury discharged, the question of further deliberation, "Allen charges," or any other resolutory devices, became forever moot.

Ordinarily, the proper remedy for a mistrial is a new trial. On the record, this is what petitioners Deerman and Kinney sought, and this is what they received. Nevertheless, in such a case as this, where the defendants were forced to send an invitation to the government to try them a second time, the true and appropriate remedy is for this Court to cancel that invitation with the constitutional bar against double jeopardy.

The second question raised on these facts is whether the jury's decision to acquit the defendants on charges of conspiracy to possess, possession, and aiding and abetting of possession with intent to distribute marijuana bars the reprosecution of the defendants for telephone calls allegedly made to facilitate the importation of the very same marijuana.

The Fifth Circuit began by agreeing with the petitioners:

> Our review of the record and the jury verdict leads us to agree with the appellants' premise that the jury necessarily rejected the government's argument that the appellants made the telephone calls in question [i.e., the calls charged in Counts 3 through 7 of the superseding indictment] to knowingly facilitate the defendants' possession of marijuana.
>
> 837 F.2d at 690 (emphasis in original).

The Fifth Circuit went on, however:

> Appellants' argument, however, requires that we answer an additional question: Does it necessarily follow that the jury also rejected the government's argument that appellants made the telephone calls to knowingly facilitate the importation of marijuana?
>
> Id. (emphasis in original).

The Fifth Circuit apparently split the elements of intent and knowledge common to both offenses, ignoring the fact that the jury, in rejecting the government's theory that the petitioners made and received the telephone calls in knowing furtherance of the plan to possess and distribute the marijuana,

had decided that the petitioners were not aware of the intended theme and purpose of the telephone calls concerning the Dulac warehouse, that is, its intended use as an offloading station for the marijuana. If petitioners had no knowledge, they could not have knowingly facilitated its possession. If the jury believed that the defendants did not know about a plan to offload the marijuana at the Dulac warehouse, the jury must also have rejected the government's theory on knowing facilitation of importation through those same telephone calls. The Fifth Circuit, however, posited its own theory of how the jurors might have acquitted Deerman and Kinney, a theory requiring that the jury disregard the judge's instructions on the law.

Specifically, the government's case in this area depended heavily upon the testimony of Edwards, a corrupt Customs official deeply involved in the scheme.

Edwards testified that he was driving another member of the conspiracy, Randy Scott Fink, to inspect the Dulac warehouse, when he became lost. He telephoned Kinney for directions. According to Edwards, Kinney, who was well aware of the significance of the Dulac warehouse, called back with directions, for a total of two facilitative calls. The three calls to Deerman were from Customs agents who were tailing trucks suspected of being intended for use in the distribution of the marijuana. Using this information, Deerman allegedly warned the truck drivers about the tail. Kinney maintained that he knew nothing of the intended use of the Dulac warehouse and had been given no indication of such use when Edwards called him. Deerman denied any knowledge of the conspiracy, contending that he received the calls from the agents as part of his legitimate duties.

The trial court instructed the jury that in order to convict the defendants on

the counts of conspiracy to possess with intent to distribute, the jury need only find that the defendant had performed one act in furtherance of the conspiracy, even if it were only a minor act. They were also instructed that they could believe a witness in whole or in part. Finally, they were admonished that they must follow the law as given and not substitute their own version of the law.

As the record shows, the jury acquitted on the count of conspiracy to possess with intent to distribute; it hung on the counts of conspiracy and attempt to import. Unless the jury disregarded the judge's instructions, it must have believed that Kinney and Deerman made the telephone calls, as they said they had, without the knowledge required for "facilitation." The only alternative, and the one suggested by the Fifth Circuit, was that the jury had believed Edwards' allegations about the

telephone calls, therefore it had not necessarily rejected the government's theory about facilitation of importation. 837 F.2d at 690-691. Such a postulation, however, would require the jury to have split its fact-finding on intent, ignore the judge's instructions on the elements of conspiracy to possess, and acquit where it should have convicted.

As this Court held in Ashe v. Swenson, 397 U.S. 436 (1970), a reviewing court applying principles of collateral estoppel has no right to postulate that a jury disregarded the instructions of law. The Ashe holding presupposes a rational jury, one that followed the court's instructions. Further, as (now) Chief Justice Rehnquist noted in United States v. Powell, 469 U.S. 57 (1984), "[E]stablished principles of collateral estoppel... are predicated on the assumption that the jury acted rationally and found certain facts in reaching its

verdict...." 469 U.S. at 68. See also, Sealfon v. United States, 332 U.S. 575, 579 (1948)(whether an acquittal bars relitigation of an issue "depends upon the facts... and the instructions under which the jury arrived at its verdict at the first trial..."); United States v. Larkin, 605 F.2d 1360, 1370 (5th Cir. 1979), on rehearing, 611 F.2d 586 (1980)("to discern... potential bases for the jury's conclusion" demands particular reliance upon the indictment and the charge to the jury...").

Nor may a court postulate a jury compromise, speculating that perhaps the jury made a lay assessment of the equities and found the defendants less guilty in some respect and more guilty in others, arriving eventually at a unanimous verdict on one count and a less-than-unanimous verdict on the other. Under Ashe and its progeny, this is impermissible; such speculation beckons courts down the short road to complete

abandonment of the principle of collateral estoppel.

Despite the Fifth Circuit's strained explanation of the acquittals, there exists a rational explanation consistent with the court's instructions. It is, simply, that the jury found Edwards' testimony insufficiently credible. It is difficult to discern this from reading the opinion of the Fifth Circuit; the reason for this is stated at the beginning of that opinion, when the court announces its standard of review:

> In reviewing the district court's ruling on appellants' motion we consider the facts developed at appellants' trial in a light most favorable to the government.

This is the Glasser standard of factual review, so named for this Court's decision in Glasser v. United States, 315 U.S. 60 (1942). The Fifth Circuit also cites the decisions of other circuit courts for this standard, including United States v. Mulherin, 710 F.2d 731 (11th Cir. 1983), cert. denied sub nom.

Moore v. United States, 464 U.S. 964 (1983). Mulherin refers to Glasser under the subheading of "sufficiency of the evidence." which is its proper application. United States v. Seijo, 437 F.2d 694 (2nd Cir. 1976), cert. denied, 429 U.S. 1043 (1977), also cited, does not mention the Glasser standard at all.

Even though the Fifth Circuit misapplied this standard of review to a collateral estoppel issue, the fact remains that the jury, having heard Edwards' tesitmony and having weighed its credibility under the judge's instructions, were unconvinced that his factual allegations about the telephone calls were true.

This adequate and rational explanation of the jury's acquittal survives even the misapplication of the Glasser standard. It cannot and must not be forced to stand up under the appellate court's intuitive speculation that the jury believed

Edwards' testimony but acquitted Deerman and Kinney in disregard of the judge's instructions. This speculation is clearly contrary to the law as articulated by this Court in Ashe v. Swenson, and must not be allowed to stand uncorrected. The jury must be presumed to have followed the judge's charge, necessarily rejecting Edwards' testimony, necessarily rejecting the allegations supporting the possession counts, and necessarily rejecting the allegations supporting the importation counts. The proper and well-settled application of collateral estoppel bars reprosecution on the telephone counts.

CONCLUSION

For the reasons stated, petitioners respectfully petition this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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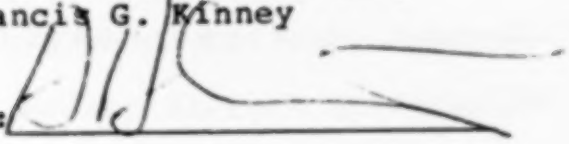
BY: 

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-3033

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VERSUS

KEITH DEERMAN and FRANCIS G. KINNEY,
Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 17, 1988)

Before CAROLYN DINEEN KING and DAVIS, Circuit Judges, and PARKER, District Judge

W. EUGENE DAVIS, Circuit Judge:

Appellants and others were tried on multiple charges relating to a scheme to introduce a large quantity of marijuana into the country. The jury acquitted appellants on two counts of the indictment and failed to agree on two other counts. The government then filed a superceding indictment against

appellants that appellants sought to dismiss on the grounds of double jeopardy and collateral estoppel. The district court denied appellants' pretrial motions to dismiss. We affirm.

I.

In reviewing the district court's ruling on appellants' motions we consider the facts developed at appellants' trial in a light most favorable to the government. See United States v. Mulherin, 710 F.2d 731 (11th Cir.), cert. denied sub nom. Moore v. United States, 464 U.S. 964, 104 S.Ct. 402, 78 L.Ed.2d 343 (1983), and Hornsby v. United States, 465 U.S. 1034, 104 S.Ct. 1305, 79 L.Ed.2d 703 (1984); United States v. Seijo, 537 F.2d 694 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S.Ct. 745, 50 L.Ed.2d 756 (1977).

Appellants, Keith Deerman and Francis G. Kinney, were employed as United States

Customs agents in charge of the marine operations in the New Orleans area. In June 1985, a former Customs agent, Sam Edwards, contacted his old friends, Kinney and Deerman, and sought their assistance in arranging the importation of more than 50,000 pounds of marijuana. At the initial meeting, the three men discussed the logistics of importing the marijuana, the payment, the availability of an offloading site, and the need to have Customs agents check names of individuals and vessels on the Treasury Enforcement Communication System (TEC) computer. According to Edwards, who was the government's star witness, both Kinney and Deerman agreed to assist in the criminal enterprise.

Randy Fink was the ringleader. His partner, Tony Varca, supplied the ships and the crew. Sam Edwards was charged with locating a suitable site to unload the

marijuana and obtaining the assistance of Customs agents in the area where the marijuana was to be landed. The total value of the shipment was approximately eighteen million dollars. The profits were to be divided into three equal shares: one third was to go to Fink and Varca, another share to the Colombian suppliers, and the remaining third to Edwards and the Customs agents chosen by Edwards to assist in the undertaking. According to Edwards, one of the major reasons the New Orleans area was selected as the site to land the marijuana was his close contact with Deerman and Kinney. Fink, who also cooperated with the government at trial, testified that New Orleans was selected because Edwards and his New Orleans agents "had more control" over their area than the South Florida agents whom he had contacted.

Kinney and Deerman lent substantial support and assistance to the efforts to land the marijuana in the New Orleans area.

A. Selection of a Site to Unload the Marijuana

Fink asked Kinney and Deerman to recommend a safe waterfront site to unload the marijuana. Kinney and Deerman initially suggested Michael Mayer's boat maintenance and repair facility as an unloading site. Deerman and Kinney knew Mayer because they had sent Customs service vessels to Mayer's yard for repairs. After Mayer declined Edwards' offer of $100,000 for use of his repair yard, Kinney accompanied Edwards to other possible offloading sites. Based on Kinney's advice, Varca purchased riverfront property for $600,000 for the unloading site. When appellants learned that a confidential informant had advised the FBI about the possible use of this site or one in that

immediate area for unloading a large amount of marijuana, appellants warned Edwards and Fink about this tip and advised against use of this site. Fink and Edwards then instructed appellants to find a new site to unload the marijuana. Appellants next suggested an abandoned riverfront warehouse in Dulac, Louisiana, that had once been seized by the U.S. Customs Service. Although appellants showed Edwards the suggested warehouse in Dulac, when Edwards attempted to drive Fink to the warehouse he lost his way and telephoned Kinney for directions. Fink approved the warehouse as an unloading site and sent the men he had hired as truck drivers (who turned out to be undercover FBI agents) to the warehouse to make repairs before the marijuana arrived.

B. Sharing with the Smugglers Information in the TEC Computer and Other Law Enforcement Intelligence

Fink and Varca used three ships to transport the marijuana from Colombia to New Orleans: the MACVIE, the BLUE STAR, and the ISLAND VENTURER. At Edwards' request, Kinney ran the names of these three ships through the TEC computer. He told Edwards that both the BLUE STAR and the ISLAND VENTURER were on the Customs "hot list." With this information, Fink and Varca used the BLUE STAR to make the first leg of the trip from Colombia to a point near Jamaica where the crews transferred the marijuana to the MACVIE. As the vessels neared New Orleans, the BLUE STAR and the ISLAND VENTURER acted as decoys while the MACVIE steamed toward the unloading site.

Appellants also diverted at least one Customs agent away from the warehouse in

Dulac where the trucks waited to receive the marijuana.

On August 18, the FBI agents working undercover as truck drivers took the U-haul trucks to the Dulac warehouse to await the arrival of the marijuana. On the following day, a Customs agent received a tip from the local sheriff's office that three U-haul trucks were at the deserted warehouse in Dulac. When this information was transmitted to appellants, Kinney telephoned Edwards and told him "that all hell had broken loose and that the State Police had seen us go in that night or early that morning,... and that it was imperative to get all the vehicles out of the warehouse, but I [Edwards] was not to go back under any circumstances." Deerman ordered surveillance of the trucks and directed the surveilling agents to obtain the names of the truck drivers from hotel desk clerks where they were directed to register

as well as any telephone numbers the drivers might dial. Deerman eventually passed all of this information along to Edwards.

The FBI ultimately realized that someone was leaking information to the smugglers, and on August 20 the agents arrested a number of the participants in the smuggling scheme, including Fink. The United States Coast Guard seized the marijuana in the Gulf of Mexico, where it was being transferred from the MACVIE to shrimp boats for transportation to the Dulac warehouse. Fink had Kinney's phone numbers with him at the time of his arrest, and when the agents searched Deerman's office they found his notes of locations and phone numbers of the three truck drivers/FBI agents and a blueprint of the Dulac warehouse.

II.

Appellants Kinney and Deerman were indicted, along with twenty-five other

defendants, in a four count indictment charging them as follows: conspiracy to import marijuana in violation of 21 U.S.C. §§ 952 and 963 (Count 1); attempted importation of marijuana in violation of 21 U.S.C. §§ 952 and 963 (Count 2); conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 3); and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 955 (Count 4).

Following the trial, the jury deliberated for approximately six hours and announced that it had reached a verdict. The jury foreman delivered a completed verdict form to the court which reflected that the jury found appellants not guilty on the possession counts (Counts 3 and 4) and guilty on the importation counts (1 and 2). When the court polled the jury, however, two of the jurors announced that they did not concur

in the convictions of appellants on Counts 1 and 2. Counsel for Deerman immediately moved for a mistrial, which the court denied. No counsel asked the court to retire the jury for further deliberations. The district court ordered the verdicts recorded and later received and considered appellants motions for a new trial. The government offered no opposition to these motions and the district court granted appellants' motions for a new trial on Counts 1 and 2.

Following these developments, the grand jury handed down a superceding indictment charging appellants with conspiracy to import marijuana and attempt to import marijuana in substantially the same form as the earlier indictment. Additionally, the grand jury charged Deerman with three counts of using the telephone to facilitate the importation offenses in violation of 21 U.S.C. § 843(b) and Kinney

with two counts of using the telephone to facilitate the importation offenses. These charges are predicated on the telephone calls Kinney made to Edwards giving him directions to the Dulac warehouse and telephone calls Deerman made to warn Edwards about the surveillance being conducted on possible unloading sites.

Kinney and Deerman both testified at the trial and admitted making the telephone calls. They denied, however, that they knew that Edwards was planning to import marijuana into the country or that the information they transmitted to him could be of any assistance in any such scheme.

The defendants moved to dismiss all counts of the superceding indictment on the following grounds. First, the government is barred from retrying defendants on Counts 1 and 2 -- the importation counts -- because the district court did not give the jury a

fair opportunity to reach a unanimous verdict. It aborted the trial without the consent of the defendants or manifest necessity for doing so. Consequently, retrial of the defendants on the importation counts is barred by the double jeopardy clause of the fifth amendment. Second, based on collateral estoppel principles, the government is also barred from trying the defendants on Counts 3 through 7 -- use of the telephone to facilitate the importation. Trial on these counts is barred because the jury, in finding appellants not guilty of the possession counts, necessarily rejected the government's contention that the appellants made telephone calls to knowingly facilitate the importation of marijuana.

We will consider each argument in turn.

III.

We consider first the appellants' argument that the government is barred from retrying the defendants on the importation counts in the superceding indictment because the district court did not give the jury a fair opportunity to reach a unanimous verdict.

After the jury foreman delivered the completed verdict form to the court announcing a guilty verdict against Deerman and Kinney on the two importation counts, the court polled the jury. When Juror No. 8 dissented from the verdict, Deerman's counsel immediately moved for a mistrial. The court denied Deerman's motion and continued to poll the jury. When the twelfth juror also dissented, Deerman's counsel again moved for mistrial. Kinney's counsel sat silent through the entire polling procedure. When the court completed polling the jury, it

asked Juror No. 8, "And in what respect is it not your verdict?" The juror responded in part, "I just can't deal with having someone's life in my hand." Although this juror admitted that she voted in favor of a guilty verdict in the jury room, she said she felt the defendants were "guilty of the counts but I can't say that. I feel that, though." Although Juror No. 12 also admitted that she had voted for conviction in the jury room, she told the court that she wished to change her vote because," In my heart, I feel like they are not guilty."

After the court finished polling the jury, two of the jurors who remained in favor of a guilty verdict made spontaneous remarks to the court which we interpret as an attack on the good faith deliberation of the dissenting jurors. Juror No. 9 stated, "I am sorry that I didn't come this morning and speak with you about it but I just think

there are some people among us who... did not ever explore the possibility of the other side and that they went in with their minds completely made up from the beginning." Juror No. 11 added, "That is absolutely right. I feel as though there are some people who had personal problems with this, who can't seem to look at all the evidence and bring their heart and their mind to thinking that they are sending somebody to jail...."

The district court then discharged the jury, recorded the verdict, and stated that "the court shall fashion its judgment based upon the jury's verdict." Appellants filed a timely motion for new trial on the importation counts; the government did not oppose the motion, and the district court granted it.

Our analysis begins with a consideration of the options available to the trial court when it discovered, upon polling

the jury, that two of the jurors dissented from the verdict. Fed.R.Crim.P. 31(d) provides:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Thus the district court had broad discretion to either direct the jury to resume its deliberations or to declare a mistrial. See Wade v. Hunter, 336 U.S. 684, 59 S.Ct. 834, 93 L.Ed. 974 (1949); United States v. Rodriguez, 497 F.2d 172 (5th Cir. 1974).

If the district court grants a mistrial in this circumstance, there is no impediment to a retrial of the defendants on the mistried counts unless the mistrial was granted without manifest necessity. As the Supreme Court in Arizona v. Washington held,

> [W]ithout exception the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.
>
> Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury.
>
> 434 U.S. 497, 508, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978); see also Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981).

The record in this case strongly suggests that the jury would have never reached a unanimous verdict. Two jurors took the difficult step of changing their vote from guilty to not guilty in open court. Statements in open court from two other jurors who remained in favor of a guilty verdict indicated the depth of the dissention among the jurors.

In United States v. Love, 597 F.2d 81 (6th Cir. 1979), a juror changed his vote when he was polled, and the trial court granted a mistrial. The court of appeals found no impediment to retrying the defendant on the mistried charges. The court stated,

> Under all of the circumstances, where a juror had voted one way in the jury room and expressed a contrary belief with respect to guilt in open court, it is unlikely that a unanimous verdict would have been reached upon further deliberation.

Id. at 86.

Thus if the district court had immediately declared a mistrial when the jury was polled, the government would clearly be entitled to retry appellants on the importation counts. We see no good reason why we should reach a different result because the trial court delayed in reaching its decision. Appellants point to no prejudice they suffered as a result of the

delay. The district court should not be criticized for taking a reasonable amount of time to consider what action it should take when unexpected events occurred as they did at the close of this trial. We conclude that the district court had every reason to believe that this jury could not agree on a verdict and discharged the jury because it was manifestly necessary to do so. The district court did not err in denying appellant's motion to dismiss the importation counts in the superceding indictment.

IV.

Kinney and Deerman next contend that the government is collaterally estopped from maintaining that the telephone calls made on August 18 and 19, 1985, which are the subject of Counts 3 through 7 of the superceding indictment, were made by them to knowingly facilitate the importation of marijuana. Appellants insist that the jury, by

acquitting them of possession and conspiracy to possess marijuana, found that appellants did not make the telephone calls to knowingly assist the smugglers. Appellants argue that if the jury had accepted the government's argument that appellants made telephone calls to actively assist the smugglers in arranging for a warehouse where the marijuana could be unloaded and warn Edwards and others of police surveillance, a rational jury would have found Deerman and Kinney guilty of all of the possession and importation counts. According to appellants, it follows that the jury could not have rationally acquitted them on the possession counts unless it rejected the government's contention that appellants made the telephone calls to knowingly assist the smugglers to import and possess the marijuana. Appellants argue that because the govenrment is required to prove that they made the telephone calls, itemized in the

superceding indictment, to knowingly facilitate the importation of marijuana, and because the jury necessarily resolved this crucial element of the government's case adversely to the government in the first trial, the government is precluded from trying appellants on those charges.

The Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), held that collateral estoppel is a part of the constitution's guarantee against double jeopardy. In this context, collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443, 90 S.Ct. at 1194. When applicable, collateral estoppel protects an accused in a criminal as well as civil proceeding and extends to prevent redetermination of evidentiary facts

as well as ultimate facts. United States v. Lee, 622 F.2d 787 (5th Cir. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1982); United States v. Gonzalez, 548 F.2d 1185 (5th Cir. 1977).

Collateral estoppel may affect a later criminal prosecution in two ways: "(1) it may completely bar a subsequent prosecution; or (2) although the subsequent prosecution may proceed, it may operate to bar the introduction or argumentation of certain facts necessarily established in a prior proceeding." United States v. Caucci, 635 F.2d 441, 448 (5th Cir.), cert. denied, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 108 (1981). We are only concerned in this case with whether the prosecution is barred.[1]

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[1]We decline to determine whether any of the government's evidence used in the earlier trial must be excluded on retrial. United States v. Lee, 622 F.2d 787, 791 (5th Cir. 1980).

Collateral estoppel bars relitigation only of those facts necessarily determined in the first trial. "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." Lee, 622 F.2d at 790 (emphasis in original); see also United States v. Levy, 803 F.2d 1390, 1398 (5th Cir. 1986). Appellants' collateral estoppel claim therefore depends upon what facts the jury necessarily decided in the first trial. In making this evaluation, we must examine allegations of the indictment, testimony, court's instructions to the jury, and jury's verdict to consider what makes the jury's verdict coherent. See Levy, 803 F.2d 1390; United States v. Henry, 661 F.2d 894 (5th Cir. 1981), cert. denied, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982); United States v. Larkin, 605 F.2d 1360, 1369 (5th Cir. 1979), cert. denied, 446 U.S. 939, 100

S.Ct. 2160, 64 L.Ed.2d 793 (1980). We should make this determination in a realistic, rational, and practical way, keeping in mind all the circumstances. Lee, 622 F.2d at 790.

Our review of the record and the jury verdict leads us to agree with the appellants' premise that the jury necessarily rejected the government's argument that appellants made the telephone calls in question to knowingly facilitate the defendants' possession of marijuana. Appellants' argument however requires that we answer an additional question: Does it necessarily follow that the jury also rejected the government's argument that appellants made the telephone calls to knowingly facilitate the importation of marijuana?

A reasonable jury was entitled to find from the evidence that (1) the expertise of Kinney and Deerman as supervisors in the

marine branch of the Customs Service and the laws they were charged with enforcing were primarily related to the illegal importation of contraband; and (2) Kinney's and Deerman's special knowledge of the safest locations on the Louisiana waterways to land a large shipment of marijuana in the New Orleans area was the main reason Fink and Edwards decided to land the marijuana within the geographic area Deerman and Kinney served. The jury was entitled to conclude from the above facts that the appellants' value to the criminal enterprise was primarily in the importation phase of the operations.

The jury was also entitled to find that most of the appellants' efforts were directed toward the importation phase of the operations rather than the possession or distribution phase. These efforts included the following: use of the law enforcement computer (TEC) to determine which of the

defendants' vessels were on the "hot" list as suspected carriers of drugs; recommending a warehouse where the marijuana could be offloaded safely without detection; transmitting confidential law enforcement information to the smugglers that would assist the smugglers in landing the marijuana without detection; and directing Customs agents to patrol in areas that would be well away from the area where the marijuana was to be landed.

In viewing the record and the jury's verdict in a practical way, we also must consider that though the jury did not convict appellants on the importation counts they also did not acquit the appellants on these counts. If the jury did reject the government's argument that the defendants made the phone calls to knowingly facilitate the importation of marijuana, then a rational

jury would have acquitted appellants on the importation counts.

In sum, because the bulk of the government's case against appellants related to their efforts to assist in the importation of the marijuana, we are persuaded that a rational jury could have found that the government established that the telephone calls were made to assist in the importation of marijuana and not its possession. The refusal of the jury to acquit on the importation counts is consistent with this explanation of the verdict. Therefore we cannot say that the jury necessarily determined that appellants did not make the telephone calls to assist in the importation of the marijuana.

AFFIRMED.

APPENDIX B

Fed.R.Crim.P. RULE 31. Verdict

* * *

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.